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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of the Secretary

In the Matter of

AMENDMENT OF PARTS 2,22 AND 25

For An Allocation of Frequencies
and Other Rules for a New
Nationwide Hybrid Space/Ground
Cellular Network for Personal/Mobile
Communication Services

RM No. 7927

PP No. 28

To: The Chief Engineer

PETITION TO DISMISS

Constellation Communications, Inc. ("CONSTELLATION") by its attorneys, hereby respectfully requests that the Federal Communications Commission ("Commission") dismiss the Petition for Rulemaking ("Petition") and Request for Pioneer's Preference ("Request") filed by Celsat Inc. ("Celsat"). These two pleadings must be dismissed because, as outlined below, they are both defective and inconsistent with Commission rules and policies.

In its Petition, Celsat proposes to use one of two sets of frequencies for the provision of mobile satellite services. As one alternative, Celsat proposes to use the 1610 to 1626.5 MHz and 2483.5 to 2500 MHz frequency bands. These

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frequencies are allocated in the United States to the Radiodetermination Satellite Service ("RDSS").^{1/} The Commission established a cut-off date of June 3, 1991 for the filing of applications to use these bands. This cut-off date was set forth in a Public Notice released by the Commission on April 1, 1991, in which it found applications by Motorola Satellite Communications, Inc. ("Motorola") and Ellipsat Corporation ("Ellipsat") acceptable for filing.

The cut-off date was established pursuant to Section 25.141(b) of the Commission's Rules which states that "each application for a space station in the radiodetermination satellite service shall be placed on public notice. . . . A 60 day cut-off period shall also be established for the filing of applications to be considered in conjunction with the original application."^{2/} The Public Notice opened the 60 day cut-off period for this proceeding. In this regard, the Notice requested interested parties to file comprehensive applications, and made clear that "applications that fail to comport with. . . the cut-off date will be dismissed as unacceptable for filing."^{3/}

^{1/} Internationally, these frequencies are allocated on a co-primary basis to RDSS and the Mobile Satellite Service ("MSS").

^{2/} 47 C.F.R. § 25.141(b).

^{3/} See, 6 FCC Rcd at 2084.

In response to the Public Notice, CONSTELLATION, TRW, Inc. ("TRW"), Loral Qualcomm Satellite Services, Inc. ("Loral/Qualcomm") and AMSC Subsidiary Corporation ("AMSC") submitted applications to use these bands. Consequently, there are now six applications pending before the Commission that were submitted prior to the cut-off date.

Celsat missed the cut-off date and has yet to file an application seeking to implement its proposed satellite system.^{4/} If Celsat were to file such an application it must be dismissed.^{5/} Celsat missed the cut-off and must

^{4/} Celsat offers no explanation in its Petition or Request for Pioneer's Preference why it failed to timely file an application within the cut-off period. Nor does it offer any reason why the Commission should re-open the cut-off period. Since the Commission has stated that any waiver of such filing deadlines would be granted only if unusual and compelling circumstances are demonstrated, it is difficult to understand what it expects to accomplish with its Petition and Request (See, Waivers of Application Filing Deadlines, 58 R.R. 2d at 1707).

^{5/} The cut-off procedures in this proceeding are consistent with the Commission's strict adherence to cut-off policies governing a range of services that underlie the Commission's jurisdiction. The Commission made this clear when it adopted the cut-off procedures for the Domestic Fixed Satellite Service. See, Space Station Application Filing Procedures, 48 Fed. Reg. 40256 (1983). In strictly enforcing these procedures, the Commission has stated that the applicants for the services in question are on notice of the cut-off date by which a completed application would need to be filed, and consequently that they assume the risk for missing the cut-off date. This reasoning has been upheld by the courts. See Ranger v. FCC, 294 240 (1961).

suffer the consequences. Any other approach would be clearly prejudicial to the pending applicants and make a mockery of the Commission's procedures. For this reason alone, any application Celsat files for concurrent consideration with the applicants that met the cut-off date must be returned as unacceptable for filing.

As an alternative to the RDSS bands, Celsat proposes to use the 2110 to 2129 MHz and 2410 to 2428 MHz frequency bands. This proposed use was based on the assumption that these frequencies would be allocated at the 1992 World Administrative Radio Conference ("1992 WARC") for MSS. This assumption was based on the expectation that the U.S. proposals to the 1992 WARC would be adopted. This did not happen. The frequencies sought by Celsat were not allocated by the 1992 WARC to the mobile satellite service. In ITU Region 2, some of this frequency cannot be used for MSS, or can only be used on a secondary basis. Considering the legal and regulatory constraints that would govern these frequencies, Celsat is not likely to find them acceptable. For this reason, it appears that Celsat proposal in its rulemaking petition is now unjustified and undesirable^{6/}.

^{6/} To the extent that Celsat intends to pursue its proposal, it could do so in the context of future Commission proceedings to implement the new MSS bands allocated by the 1992 WARC.

Since both proposals set forth in the Celsat Petition are not viable, there is no legitimate reason to give its Petition any further consideration. Section 1.407 of the Commission's Rules states that if, the Commission determines that a rulemaking proceeding is either not "justified" or "desirable" the petition for rulemaking will be denied.^{7/} Furthermore, petitions that are "moot, premature, repetitive, frivolous, or which plainly do not warrant consideration by the Commission may be denied or dismissed without prejudice to the petitioner."^{8/} These circumstances exist in this case and, therefore, the Celsat Petition for Rulemaking must be dismissed.

When the Commission dismisses the Celsat Petition for Rulemaking it must also dismiss the Celsat request for a Pioneer's Preference. This is because, under FCC policy, Celsat cannot qualify for a Pioneer's Preference unless it submits a rulemaking petition requesting either an allocation of spectrum or an amendment of the existing rules to accommodate the proposed new service or new technology.^{9/}

^{7/} See, 47 C.F.R. Section 1.407.

^{8/} See, Petitions for Rulemaking, 47 Rad. Reg. 2d 1068, 1069 (1980).

^{9/} See, Establishment of Procedures for Pioneer's Preference, 69 Rad. Reg. 2d 141, 147 (1991).

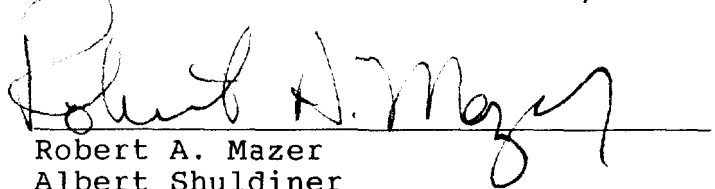
Since Celsat's Petition is based on proposals that are non-viable, its Request for a Pioneer's Preference does not meet the basic qualification requirements (being accompanied by a legitimate Petition for Rulemaking) established by the Commission, and must therefore be dismissed.

CONCLUSION

For all of the above reasons, CONSTELLATION urges the Commission to dismiss the Celsat Petition for Rulemaking, and deny its Request for Pioneer's Preference.

Respectfully submitted,

CONSTELLATION COMMUNICATIONS, INC.

A handwritten signature in dark ink, appearing to read "Robert A. Mazer", is written over a horizontal line.

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April 8, 1992

CERTIFICATE OF SERVICE

I, Robert A. Mazer, hereby certify that a copy of the foregoing Petition to Dismiss of Constellation Communications, Inc., was sent by first class United States mail, postage prepaid, this 8th day of April 1992, to the following:

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